Bhavanash Sharma a/l Gurcharan Singh Sharma (practicing under the name and style of 'Bhavanash Sharma') v Jagmohan Singh Sandhu and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-04(IM)(NCVC)-152–04 OF 2021 AND W-04(IM)(NCVC)-235–05 OF 2021
VAZEER ALAM, MARIANA YAHYA AND AZIMAH OMAR JJCA
13 OCTOBER 2023

Civil Procedure — Contempt of court — Committal proceedings — Appellant's application to cite respondents for contempt was dismissed by sessions court and High Court — Filing of unsigned witness statements by respondents without consulting or meeting witness — Whether sessions court's analysis of alleged contemptuous conduct based on admissibility and relevancy of impugned witness statement at trial was appropriate in law — Whether High Court's finding that sessions court's dismissal of committal application was unappealable 'ruling' instead of 'decision' was appropriate in law — Rules of Court 2012 O 55 r 5

These two appeals ('Appeal 152' and 'Appeal 235') revolved around an unsigned witness statement of one David Allen Martinez ('the impugned WS') which was filed by the respondent via the respondent's solicitors without ever consulting or even meeting David Allen Martinez ('Allen Martinez'). However, the appellant withdrew Appeal 152 and only proceeded with Appeal 235 which was the appellant's appeal against the concurrent decisions of the sessions court and the High Court to dismiss the appellant's application to cite the respondent and the respondent's solicitors for contempt. It started from the filing of six witness statements (inclusive of the impugned WS) by the respondent's solicitors. It was later revealed and admitted by the respondent's solicitors that the impugned WS was filed without any communication, confirmation nor meeting with Allen Martinez. Allen Martinez then filed an affidavit denying each and every answer in the impugned WS and averred that he had neither communicated with nor met the respondent's solicitors prior to the filing of the impugned WS. Thereafter, the appellant expeditiously filed an application to expunge the impugned WS. The respondent's solicitors filed an affidavit in reply to challenge the appellant's expungement application admitting that the firm had filed the impugned WS without meeting Allen Martinez and was relying on the respondent's instruction and supposed 'confirmation' that the respondent had finalised the contents of the impugned WS with Allen Martinez. The appellant accordingly filed an application for leave to initiate contempt proceedings against the respondent and his solicitors. The sessions court allowed the leave application. Thus, the appellant

consequently filed an application to cite the respondents for contempt ('encl 111'). The sessions court dismissed encl 111 on the ground that the unsigned impugned WS shall not affect the court's determination on merits. Upon appeal, the High Court dismissed the appellant's appeal mainly on the following reasons: (a) the sessions court's decision in dismissing encl 111 was not a 'decision' (which was appealable under O 55 of the Rules of Court 2012 ('the ROC')) and was merely a ruling; and (b) the sessions court's 'ruling' on the committal application was unappealable as the committal application was premature (and subjudice) because Allen Martinez had not yet been fully heard before the court. Hence, this appeal. The issues for determination were: (i) whether the sessions court's analysis of the alleged contemptuous conduct based on the admissibility and relevancy of the impugned WS at trial was appropriate in law ('issue 1'); and (ii) whether the High Court's finding that the sessions court's dismissal of encl 111 was an unappealable 'ruling' instead of a 'decision' was appropriate in law ('issue 2').

Held, allowing the appeal:

(1) The sessions court's reliance on the admissibility and relevancy to the impugned WS as evidence at trial was unfortunately misplaced. The filing of the impugned WS was not a 'mistake'. The impugned WS was knowingly filed notwithstanding the full knowledge that the solicitors had not communicated, consulted, nor have met Allen Martinez. It was not the contents nor the veracity of the contents of the impugned WS that irritated and offended the face of the court, but it was the callous conduct of the solicitors in filing the impugned WS that accorded contempt of court. Thus, although the impugned WS would not be admissible as evidence under s 73A of the Evidence Act 1950 as it was unsigned, the inadmissibility or the non-reference of the impugned WS did not at all erase or evaporate the solicitors' contemptuous conduct of improperly filing the impugned WS. The matter regarding the impugned WS was not academic just because the impugned WS was never evidence or was not referred to at trial. The respondent's argument that there was no contempt just because the impugned WS was not admitted as evidence did not at all wash the stain of contempt. There should be no room or space at all to negotiate an improper document notwithstanding the severity of the impugned WS's falsehood. Therefore, issue 1 was answered in the negative. It was plainly wrong for the sessions court to dismiss encl 111 merely on the basis of the inadmissibility and non-reference of the impugned WS at trial. Whether or not the impugned WS was admitted as evidence to affect the merits of the case was altogether a separate matter than that of the manner and method the impugned WS was unethically prepared and filed by the respondents (see paras 17–18, 20–22, 25 & 29–30).

(2) The learned High Court judge's ('HCJ') decision was made per incuriam and contrary to the plain wordings and workings of O 55 r 5 of the ROC. The HCJ had misguided himself as to the simple definition of a decision as defined under O 55 of the ROC. The sessions court's decision to dismiss encl 111 was indeed an appealable decision before full trial under O 55 r 5 of the ROC. Further, the issue of admittance or reference to the impugned WS at trial was altogether a separate issue from the improper and unethical manner in which the impugned WS was prepared and filed by the respondents. Thus, the committal proceeding bore no effect against the merits of the case at trial. Issue 2 was answered in the negative. The HCJ had erred in dismissing the appellant's appeal on the basis that the sessions court's decision was an unappealable 'ruling' (see paras 31–32, 34–35 & 37).

[Bahasa Malaysia summary

Kedua-dua rayuan ini ('Rayuan 152' dan 'Rayuan 235') adalah mengenai satu pernyataan saksi yang tidak ditandatangani oleh seorang bernama David Allen Martinez ('PS yang dipersoalkan') yang difailkan oleh responden melalui peguam responden tanpa pernah berunding atau bahkan bertemu dengan David Allen Martinez ('Allen Martinez'). Walau bagaimanapun, perayu menarik balik Rayuan 152 dan hanya meneruskan dengan Rayuan 235 iaitu rayuan perayu terhadap keputusan serentak mahkamah sesyen dan Mahkamah Tinggi untuk menolak permohonan perayu untuk menyaman responden dan peguam responden untuk penghinaan mahhkamah. Ia bermula dari pemfailan enam kenyataan saksi (termasuk PS yang dipersoalkan) oleh peguam responden. Kemudian didedahkan dan diakui oleh peguam responden bahawa PS yang dipersoalkan difailkan tanpa sebarang komunikasi, pengesahan atau perjumpaan dengan Allen Martinez. Allen Martinez kemudian memfailkan afidavit menafikan setiap jawapan dalam PS yang dipersoalkan tersebut dan menyatakan bahawa beliau tidak pernah berkomunikasi dengan atau bertemu peguam responden sebelum pemfailan PS yang dipersoalkan. Selepas itu, perayu dengan segera memfailkan permohonan untuk membatalkan PS yang dipersoalkan tersebut. Peguam responden memfailkan afidavit sebagai balasan untuk mencabar permohonan pembatalan perayu dengan mengakui bahawa firma tersebut telah memfailkan PS yang dipersoalkan tanpa bertemu Allen Martinez dan bergantung kepada arahan responden dan 'pengesahan' bahawa responden telah memuktamadkan kandungan PS yang dipersoalkan tersebut dengan Allen Martinez. Oleh itu, perayu memfailkan permohonan untuk memohon kebenaran untuk memulakan prosiding penghinaan terhadap responden dan peguamnya. Mahkamah sesyen membenarkan permohonan kebenaran tersebut. Maka, perayu seterusnya memfailkan permohonan untuk menyaman responden untuk penghinaan mahkamah ('lampiran 111'). Mahkamah sesyen menolak lampiran 111 atas alasan bahawa PS yang tidak ditandatangani tersebut tidak akan menjejaskan penentuan mahkamah atas merit. Selepas rayuan, Mahkamah Tinggi menolak rayuan perayu terutamanya

berdasarkan alasan berikut: (a) keputusan mahkamah sesyen untuk menolak lampiran 111 bukanlah suatu 'keputusan' (yang boleh dirayu di bawah A 55 Kaedah-Kaedah Mahkamah 2012 ('KKM')) dan hanyalah satu arahan; dan (b) 'arahan' mahkamah sesyen mengenai permohonan komital tidak boleh dirayu kerana permohonan komital tersebut adalah pramatang (dan subjudice) kerana Allen Martinez belum lagi didengar sepenuhnya di hadapan mahkamah. Oleh itu, rayuan ini. Isu-isu untuk penentuan ialah: (i) sama ada analisis mahkamah sesyen terhadap kelakuan yang dikatakan menghina berdasarkan kebolehterimaan dan kerelevanan PS yang dipersoalkan dalam perbicaraan adalah diperuntukkan dalam undang-undang ('isu 1'); dan (ii) sama ada penemuan Mahkamah Tinggi bahawa penolakan lampiran 111 oleh mahkamah sesyen adalah satu 'arahan' yang tidak boleh dirayu dan bukannya satu 'keputusan' adalah diperuntukkan dalam undang-undang ('isu 2').

Diputuskan, membenarkan rayuan:

(1) Kebergantungan mahkamah sesyen terhadap kebolehterimaan dan kerelevanan kepada PS yang dipersoalkan sebagai keterangan dalam perbicaraan adalah malangnya tidak tepat. Pemfailan PS yang dipersoalkan bukanlah satu 'kesilapan'. PS yang dipersoalkan telah difailkan dengan sengaja walaupun mengetahui sepenuhnya bahawa peguam tidak berkomunikasi, berunding, atau bertemu dengan Allen Martinez. Bukan kandungan atau ketepatan kandungan PS yang dipersoalkan yang mengganggu dan menyinggung mahkamah, tetapi kelakuan peguam dengan tidak peduli dalam memfailkan PS yang dipersoalkan yang membawa kepada penghinaan terhadap mahkamah. Oleh itu, walaupun PS yang dipersoalkan tidak boleh diterima sebagai keterangan di bawah s 73A Akta Keterangan 1950 kerana ia tidak ditandatangani, ketidakbolehterimaan atau ketiadaan rujukan kepada PS yang dipersoalkan sama sekali tidak menghapuskan atau melenyapkan kelakuan peguam yang menghina dengan secara tidak wajar memfailkan PS yang dipersoalkan tersebut. Perkara mengenai PS yang dipersoalkan bukanlah sesuatu yang akademik hanya kerana PS yang dipersoalkan tidak pernah menjadi keterangan atau tidak dirujuk dalam perbicaraan. Hujahan responden bahawa tiada penghinaan hanya kerana PS yang dipersoalkan tidak diterima sebagai keterangan sama sekali tidak menghapuskan noda penghinaan tersebut. Seharusnya tiada ruang atau peluang sama sekali untuk merundingkan dokumen yang tidak wajar walau seteruk mana pun kepalsuan PS yang dipersoalkan tersebut. Oleh itu, isu 1 dijawab secara negatif. Adalah jelas salah bagi mahkamah sesyen untuk menolak lampiran 111 hanya atas dasar ketidakbolehterimaan dan ketiadaan rujukan kepada PS yang dipersoalkan dalam perbicaraan. Sama ada PS yang dipersoalkan diterima sebagai keterangan untuk mempengaruhi merit kes adalah perkara yang sama sekali berbeza

daripada cara dan kaedah PS yang dipersoalkan disediakan dan difailkan secara tidak beretika oleh responden (lihat perenggan 17–18, 20–22, 25 & 29–30).

(2) Keputusan hakim Mahkamah Tinggi ('HMT') dibuat secara per incuriam dan bertentangan dengan perkataan dan cara kerja A 55 k 5 KKM. HMT telah tersilap panduan mengenai takrifan mudah keputusan seperti yang ditakrifkan di bawah A 55 KKM. Keputusan mahkamah sesyen untuk menolak lampiran 111 sebenarnya adalah keputusan yang boleh dirayu sebelum perbicaraan penuh di bawah A 55 k 5 KKM. Selain itu, isu penerimaan atau rujukan kepada PS yang dipersoalkan dalam perbicaraan sama sekali adalah isu yang berbeza daripada cara tidak wajar dan tidak beretika PS yang dipersoalkan disediakan dan difailkan oleh responden. Oleh itu, prosiding komital tidak memberi kesan terhadap merit kes dalam perbicaraan. Isu 2 dijawab secara negatif. HMT telah terkhilaf dalam menolak rayuan perayu atas dasar bahawa keputusan mahkamah sesyen adalah satu 'arahan' yang tidak boleh dirayu (lihat perenggan 31–32, 34–35 & 37).]

Cases referred to

Kyle v Legal Practitioners' Complaints Committee [1999] WASCA 115, SC (refd)

Rajasooria v Disciplinary Committee [1955] 1 MLJ 65, PC (refd)

Seow Hoon Hin v Hartalega Holdings Bhd & Ors [2019] 5 MLJ 421, CA (refd)

Sharma Kumari a/p Oam Parkash v PP [2000] 6 MLJ 790, HC (folld)

Tan Sri Datuk Nadraja a/l Ratnam v Murali a/l Subramaniam (Dato Sivakumar a/l Nadraja, intervener) [2017] MLJU 2307, HC (refd)

Legislation referred to

Evidence Act 1950 s 73A

Rules of Court 2012 O 55, O 55 rr 1, 3, 5

Appeal from: Civil Appeal No WA-12ANCvC-205–08 of 2020 (High Court, Kuala Lumpur)

Malik Imtiaz bin Ghulam Sarwar (with Lim Yvonne) (Bhavanash Sharma) for the appellant.

Harpal Singh Grewal (with Rathi a/p Jebaratnam, Bernard Francis, Meneesha Kaur and Nahvinah Selvaraj) (Dinesh Ratnarajah Partnership) for the respondent.

Azimah Omar JCA:

BACKGROUND FACTS

[1] There are two appeals before us. These two appeals revolve around an unsigned witness statement of one, Mr David Allen Martinez ('impugned WS') which was filed by the respondent (via the respondent's solicitors, Messrs Richard Talalla & Harun) without ever consulting or even meeting Mr David Allen Martinez ('Allen Martinez') on 28 February 2020. The respondent for both these appeals before this court is Jagmohan Singh Sandhu. Whilst the appellant in these two appeals is Bhavanash Sharma a/l Gurchan Singh Sharma (practising under the name and style of 'Bhavanash Sharma')

[2] Civil Suit No W-04(IM)(NCVC)-152–04 of 2021 ('Appeal 152') is the appellant's appeal against the concurrent decisions of the sessions court and the High Court to dismiss the appellant's application to expunge the impugned witness statement ('WS'). Meanwhile, Civil Suit No W-04(IM)(NCVC)-235–05 of 2021 ('Appeal 235') is the appellant's appeal against the concurrent decisions of the sessions court and the High Court to dismiss the appellant's application to cite the respondent and the respondent's solicitors for contempt.

[3] At the beginning of the hearing of both appeals on 20 February 2023, the learned counsel for the appellant has informed us that the appellant intended to withdraw Appeal 152 and only proceed with Appeal 235. Thus, we shall only proceed to determine the propriety of the sessions court's and High Court's decisions in dismissing the appellant's application to cite the respondent (and the respondent's solicitors) for contempt.

[4] For a better understanding of the matter at hand, it is necessary to set out the facts of the case that has led to the filing of Appeal 235 by the appellant. Nonetheless, we are most aware that the present appeal (and proceedings for contempt) has no nexus at all to the factual matrix and merits of the parties' dispute. In fact, we are minded as to not disturb the previous courts' determination on merits. Thus, the relevant facts which ought to be considered by us are only the facts revolving around the preparation and filing of the impugned WS by the respondent via his solicitors.

[5] Considering the proper limited scope above, the facts of the present appeal began from the filing of six witness statement (inclusive of the impugned WS of Allen Martinez) by the respondent's solicitors on 28 February 2020. Ordinary prudence and trite ethical obligation would dictate that solicitors must not abuse the Rules of Court 2012's allowance to use witness statement as means of examination-in-chief and thus, solicitors must ensure

A that the testifying witness confirms that the contents of the witness statement to be that witness' own words and testimony prior to the filing of the witness statement. Whether the witness statement was later signed and admitted before the court is distinctly a separate matter of procedure of admitting and adducing evidence into court. It is basic rule of law and ethics that a solicitor should not
B put his own words and narrative into the mouth of a witness.

[6] However, it is the exact cardinal rule above which the respondent's solicitors seem to have breached when it was later revealed and admitted by the respondent's ow n solicitors that the impugned WS was filed without any
C communication, confirmation, nor meeting with Allen Martinez.

[7] On 3 March 2020, Allen Martinez filed an affidavit denying each and every answer in the impugned WS. Most importantly, Allen Martinez averred that he had neither communicated with nor met the respondent's solicitors
D prior to the filing of the impugned WS. Thereafter, the appellant expeditiously filed an application to expunge the impugned WS.

[8] In a startling admission, the respondent's solicitors filed an affidavit in
E reply on 29 May 2020 to challenge the appellant's expungement application admitting that the firm had filed the impugned WS without meeting Allen Martinez and was relying on the plaintiff's instruction and supposed 'confirmation' that the plaintiff had finalised the contents of the impugned WS with Allen Martinez. This admission was later reaffirmed in a series of affidavits
F by the respondent's solicitors filed during the contempt proceedings.

[9] Upon this revelation, the appellant accordingly filed an application for leave to initiate contempt proceedings against the respondent and his solicitors on 24 July 2020. On 30 July 2020, the sessions court allowed the leave
G application. Thus, the appellant consequently filed an application to cite the respondents for contempt on 5 August 2020 ('encl 111').

[10] Notwithstanding the impending contempt proceedings, the main trial of the case proceeded on. Thus on 23 September 2020, Allen Martinez
H attended the court as the appellant's witness and testified that the earlier impugned WS was filed without his consent or knowledge.

[11] To challenge encl 111, the respondent's solicitors, Mr Mark Robin Tallala, and Mahadeva a/l Gnaneswaran filed their respective affidavits in reply.
I Both solicitors admitted to had never met Allen Martinez and never sought personal confirmation from Allen Martinez prior to the filing of the impugned WS. Instead, both solicitors adopted a deflective stance in blaming their own client, the respondent (in that the impugned WS was filed on the respondent's instructions and the respondent's supposed confirmation and finalisation with

Allen Martinez. We have perused both the affidavits of the respondent's solicitors and have identified the following shared similarities:

(a) both solicitors admitted that *they have never met Allen Martinez*;

(b) both solicitors admitted that they have proceeded to file the impugned WS *despite not personally have met or discussed the contents of the impugned WS with Allen Martinez*;

(c) both solicitors put the blame on their client (the respondent), where they had relied solely on the respondent's instruction and supposition that the respondent had finalised the contents of the impugned WS with Allen Martinez;

(d) *both solicitors had never personally sought out Allen Martinez's confirmation* and just relied on the plaintiff's instructions to deduce that it is proper to file the impugned WS *without ever communicating with Allen Martinez*; and

(e) both solicitors were trying to hide their filing of the impugned WS on the argument that the impugned WS was unsigned and shall not be referred to in the course of trial.

THE SESSIONS COURT'S FINDINGS

[12] On 11 December 2020, the sessions court had dismissed encl 111 primarily on the ground that the unsigned impugned WS shall not affect the court's determination on merits:

(a) the filing of the impugned WS by the respondent's solicitors was just a 'mistake';

(b) the respondent was not calling Allen Martinez to testify as their witness and was no longer relying on the impugned WS;

(c) the impugned WS was unsigned and shall not be taken into as evidence to be considered by the court; and

(d) since the impugned WS is not evidence and is inadmissible for the court to consider, thus the circumstances revolving the eventual filing of the impugned WS is academic.

THE HIGH COURT'S FINDINGS

[13] Upon appeal, the High Court had dismissed the appellant's appeal on 10 May 2021 mainly on the following reasons:

(a) the sessions court's decision in dismissing encl 111 (contempt application) was not a 'decision' (which is appealable under O 55 of the Rules of Court 2012) and was merely a ruling; and

(b) the sessions court's 'ruling' on the committal application was unappealable as the committal application was pre-mature (and subjudice) because the subject witness, Allen Martinez, has not yet been fully heard before the court.

THE APPEAL BEFORE US

[14] We have perused both the sessions court's and High Court's grounds of judgment as well as the appellant's memorandum of appeal (alongside the relevant affidavits filed throughout the committal proceedings) and found that the appeal before us can be determined by answering the following issues:

(a) issue 1: whether or not the sessions court's analysis of the alleged contemptuous conduct based on the admissibility and relevancy of the impugned WS at trial was appropriate in law; and

(b) issue 2: whether or not the High Court's finding that the sessions court's dismissal of encl 111 (committal application) was an unappealable 'ruling' instead of a 'decision' was appropriate in law.

ISSUE 1: WHETHER OR NOT THE SESSIONS COURT'S ANALYSIS OF THE ALLEGED CONTEMPTUOUS CONDUCT BASED ON THE ADMISSIBILITY AND RELEVANCY OF THE IMPUGNED WS AT TRIAL WAS APPROPRIATE IN LAW

[15] As we have intimated earlier above, the issue whether or not a conduct of a litigant (or his solicitors) was contemptuous or not does not necessarily relate to whether or not such contempt would affect the merits or the determination of a case on its merits. When we speak of proper and ethical conduct of litigants and solicitors as officers of the court, such matters transcend matters of merits. The old adage goes that justice must not only be done, but also *must be seen to be done*. And for justice to be seen to be done, the manner and method of solicitors chose to prop up their clients' case must also be made in solemn honesty, diligence, and integrity. Solicitors are first and foremost the officers of the court, before they are the protectors of the interest of their respective clients.

[16] Thus, apart from the core merits of a case, the manner and method a solicitor chooses to apply the Rules of Court 2012's allowance of a witness statement (as means of examination-in-chief) is a *separate ethical issue altogether*.

[17] Thus, we find that sessions court's reliance on the admissibility and relevancy of the impugned WS as evidence at trial was unfortunately misplaced. It would be unsavoury and unwise for us to allow a state of practice

or precedent that solicitors are allowed to put together any beneficial narrative they see fit as witness' testimony (without communicating or confirming with that witness) just so that they can take a chance that either:

(a) a witness under pressure of the witness stand would just play along and confirm whatever the solicitor suggests to be that witness' supposed testimony; or

(b) in case the witness outright denies ever consenting to the contents of a witness statement, that solicitor can just 'clean house' and opt not to call that witness nor refer to the witness statement that the solicitor had wrongly prepared and filed.

[18] Such a precedent is certainly undesirable. We disagree with the sessions court's finding that the filing of the impugned WS was merely a 'mistake'. This was neither an instance where a draft or incomplete 'version' of a witness statement was 'mistakenly filed'. Instead, the impugned WS was knowingly filed notwithstanding the full knowledge that the solicitors have not communicated, consulted, nor have met Allen Martinez. The solicitors knew they have not obtained proper confirmation from the intended witness and yet they found it acceptable to ignore the absence of personal confirmation. Instead, the solicitors felt it was appropriate to just rely on the instructions and confirmation of their client. The solicitors cannot entrust the responsibility to their client to obtain proper confirmation from the intended witness. The solicitors held the ultimate key to file the impugned WS, and even without communicating with Allen Martinez, the solicitors saw it fit to proceed.

[19] Nor was this a case of a witness turning hostile against his prior communication or statements confirmed with the solicitors. Since the respondent's solicitors had not considered that it was necessary to seek a formal confirmation from Allen Martinez prior to the filing of the impugned WS, it cannot be said that Allen Martinez had somehow now renege or renounce his earlier statements allegedly confirmed in the impugned WS.

[20] The entire series of events above has nothing to do with the merits of the parties' case, and yet the same series of events clearly reveals a conduct which went beyond 'mistake' and encroached the realm of inconsiderate presumptions and dishonesty. It is not the contents nor the veracity of the contents of the impugned WS that irritates and offended the face of the court, but it was the callous conduct of the solicitors in filing the impugned WS that accords contempt of court.

[21] Thus, although we agree with the sessions court that the impugned WS would not be admissible as evidence under s 73A of the Evidence Act 1950 as it was unsigned (see *Seow Hoon Hin v Hartalega Holdings Bhd & Ors*), we still

find that the inadmissibility or the non-reference of the impugned WS does not at all erase or evaporates the solicitors' contemptuous conduct of improperly filing the impugned WS. Whether or not the impugned WS was referred to or even used at trial has nothing to do with the respondent's solicitors' conduct of improperly filing the impugned WS without ever consulting or personally confirming with Allen Martinez. It is already an affront to justice for solicitors to 'coach' a witness, what more to insist a solicitor's own words as a witness' written testimony.

[22] The respondent might have successfully swept the improper filing of the impugned WS under the rug as far as the court's determination on merits is concerned. But the same cannot at all be said against the appellant's application in encl 111 for contempt of court. We disagree with the sessions court's finding that the matter regarding the impugned WS is now academic just because the impugned WS was never evidence or was not referred to at trial.

[23] In fact, the fact that the case had already been put through full trial and had been determined in favour of the respondent, still does not relinquish the respondent's contemptuous conduct in improperly filing the impugned WS. There has never been a rule or precedent that contempt follows the event or outcome of the main litigation nor should there ever be such rule of law. Contempt remains a contempt no matter how meritorious the main case of the contemnor (or contemnor's client) would be.

[24] We are inclined to agree with the appellant's argument for deterrence to deter any likelihood of false testimony no matter how remote and to keep the court as far as possible free from even being filed any false or improper documents. We agree with the salutary words in *Sharma Kumari a/p Oam Parkash v Public Prosecutor* [2000] 6 MLJ 790:

> *The system of justice will collapse if witnesses and d eponents feel free to give false evidence or testimony (see Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 (FC)). Such acts are nothing but a contempt of our peers and of the administration of justice and is wholly contrary to the public interest. *The making or giving of false evidence, if proven, must therefore be dealt with, with the clear objective of deterrence, not only of that individual from repetition, but also to deter others*. To wait until such offences are rampant like drugs and traffic cases before taking strict action will put the administration of justice in jeopardy. *ANY RISK of the court acting upon false evidence is unacceptable since it results in injustice*. Any system of administration of justice that tolerates false statements in affidavits risks ridicule.

[25] Nantha Balan J (now JCA) in the case of *Tan Sri Datuk Nadraja a/l Ratnam v Murali a/l Subramaniam (Dato Sivakumar a/l Nadraja, intervener)* [2017] MLJU 2307 has also referred to the case of *Sharma Kumari* above and found that any conduct which *MAY RISK the admission of false testimony is an*

affront to the administration of justice and shall be considered contempt of court.

[26] It must be highlighted that the keyword is 'risk' of false testimony. Thus, the deterrence must go as far to eliminate the 'risk' of false testimony and not only actual admission or reference to false testimony. Therefore, the respondent's argument that there was no contempt just because the impugned WS was not admitted as evidence does not at all wash the stain of contempt.

[27] We also found wisdom in the commonwealth decision in *Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115:

> In England, *the ethical rule is that lawyers should not produce witness statement that they know to be false or where they know that the witness does not believe the statement to be true in all respects*. Further, if, *after filing a witness statement, a lawyer is put on enquiry as to the truth of the facts stated in the statement, the lawyer should, where practicable, check whether those facts are true*. If the lawyer then discovers that the witness statement which has been served is incorrect, the *lawyer must inform the other parties immediately* ... In my view this rule reflects the duties that lawyers in this country owe to the court.

[28] We would expand further that apart from a solicitor's duty to enquire after the filing of a witness statement, a solicitor would also be put on enquiry, wherever and whenever practicable before the filing of the witness statement, to check with the witness himself, whether those facts in the witness statement were true. It should be obvious that a solicitor must practice utmost due diligence to verify the authenticity of any document (inclusive of witness statement) prior to the filing of the same. There should be no reason whatsoever that witness statement should be exempted from the same duty of due diligence. And the respondents' contempt is considerably more explicit due to the admission that the respondent's solicitors did not even bother to reach out to Allen Martinez for a personal confirmation of the contents of the impugned WS.

[29] Closer to home, we refer to the Privy Council's decision in *Rajasooria v Disciplinary Committee* [1955] 1 MLJ 65 in which the Privy Council admonished the conduct of a solicitor who knowingly and deliberately submit a false document to be an improper conduct akin to 'deceit':

> For an advocate and solicitor knowingly and deliberately to submit a false document intending to be acted upon was grossly improper conduct as being dishonourable both to himself and to his profession. The submission of such a document with such intention in itself involved an element of deceit.

[30] Although the degree of falsity involved in *Rajasooria* is more severe than that of the impugned WS in the present appeal, we find that there should be no room or space at all to negotiate an improper document notwithstanding the

severity of the impugned WS's falsehood. It matters not to us if the contents of the impugned WS might contain any degree of truth, but we still cannot ignore or neglect the unethical manner in which the impugned WS was prepared and falsely insinuated to be the words and testimony of Allen Martinez. The unethical preparation and filing of the impugned WS itself (besides the contents of the impugned WS) already contains some element of 'deceit'.

[31] Considering all of the above deliberation, we answer issue 1 *in the negative*. It was plainly wrong for the sessions court to dismiss encl 111 merely on the basis of the inadmissibility and non-reference of the impugned WS at trial. Whether or not the impugned WS was admitted as evidence to affect the merits of the case is altogether a separate matter than that of the manner and method the impugned WS was unethically prepared and filed by the respondents.

ISSUE 2: WHETHER OR NOT THE HIGH COURT'S FINDING THAT THE SESSIONS COURT'S DISMISSAL OF ENCL 111 (COMMITTAL APPLICATION) WAS AN UNAPPEALABLE 'RULING' INSTEAD OF A 'DECISION' WAS APPROPRIATE IN LAW

[32] We have examined the brief grounds of judgment of the learned High Court judge ('learned judge') and unfortunately found that the learned judge's decision was made per incuriam and contrary to the plain wordings and workings of O 55 r 5 of the Rules of Court 2012.

[33] First and foremost, the learned judge himself has misguided himself as to the simple definition of a decision as defined under O 55 of the Rules of Court 2012. Initially, the learned judge has correctly appreciated that O 55 r 1 of the Rules of Court 2012 defines 'decision' as 'judgement, order and decree'. The learned judge also properly appreciated that the same provision allows for Appeals against decisions after full trial (specifically O 55 r 3 of the Rules of Court 2012), *and also against decisions BEFORE full trial (specifically O 55 r 5 of the Rules of Court 2012)*.

[34] Nonetheless, although appreciating the provisions above, the learned judge somehow found that the sessions court's order to dismiss encl 111 was merely a 'finding' and not an appealable decision under O 55 of the Rules of Court 2012. The supposed reason afforded was that the committal application would somehow 'prejudice' the trial as the truth of Allen Martinez's testimony (and the contents of the impugned WS) was still subjudice and yet to be tested at trial. However, this supposed ground on 'prejudice' was never supported by any provision or any precedent within the learned judge's grounds of judgment.

[35] We found that it is plain to see that firstly, the sessions court's decision to dismiss encl 111 was indeed an appealable decision before full trial under O 55 r 5 of the Rules of Court 2012. The appellant applied for committal proceedings, and the sessions court decided to dismiss encl 111 and even ordered costs against the appellant. This was a decision and an order of the sessions court before trial which falls squarely under O 55 r 5 of the Rules of Court 2012.

[36] Secondly, as we have found earlier, the issue of admittance or reference to the impugned WS at trial is altogether a separate issue from the improper and unethical manner in which the impugned WS was prepared and filed by the respondents. Thus, the committal proceeding bears no effect against the merits of the case at trial. The contemptuous conduct does not depend on the falsehood of the contents of the impugned WS, but instead the unethical manner the impugned WS was prepared and filed.

[37] Furthermore, even if the case were to proceed to full trial, the veracity and truth of the contents in the impugned WS would not necessarily be tested as the impugned WS would not have been admitted as evidence to be referred to during trial. Thus, we cannot simply allow the respondents to be left unscathed considering their improper conduct in preparing and filing the impugned WS. As we have stated earlier, we cannot allow the respondents to simply wash their hands when they were caught red handed for improperly preparing and filing the impugned WS.

[38] Considering all of the above in this part, and on the precedents referred to in our judgment in issue 1, we also answer issue 2 *in the negative*. The learned judge has erred in dismissing the appellant's appeal on the basis that the sessions court's decision was an unappealable 'ruling'.

THIS COURT'S DECISION

[39] All of the above deliberations considered, we find that there are merits in the present appeal. Thus, we allow the present appeal (Appeal 235). Therefore, the sessions court judge's as well as the learned High Court judge's decision, findings, and orders are hereby reversed and set aside. We also accordingly allow the appellant's encl 111 at the sessions court to cite the respondent and the respondent's solicitors for contempt. We also order that the respondent be liable to pay costs to the appellant.

[40] In respect of Appeal 152, we noted that at the beginning of the hearing of both appeals the learned counsel for the appellant had informed us that the appellant intended to withdraw Appeal 152 and sought leave to withdraw the

A said appeal. However, the counsel for the respondent had taken the position that the respondent is entitled to costs on such withdrawal.

B **[41]** On the issue of costs, this court also orders that the respondent is liable to pay costs of RM20,000 (here and below) to the appellant in respect of Appeal 235, subject to payment of allocator. With respect to the withdrawal of Appeal 152 by the appellant, the appellant is to pay the respondent costs of RM5,000 subject to payment of allocator.

C **[42]** Finally, this court orders that the case to be remitted back to the sessions court Kuala Lumpur for the contempt proceedings to proceed.

Appeal allowed.

D Reported by Nabilah Syahida Abdullah Salleh

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